

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 August 2006

Case No. 2005-BLA-5615

In the Matter of:
B.S.,¹
Claimant,

v.

TROJAN MINING,
Employer,
and
TRAVELERS INSURANCE CO.,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party in Interest.

APPEARANCES:

Thomas A. Grooms, Esq.
On Behalf of the Solicitor

B.S., Pro Se,
On behalf of Claimant

John Logan Griffith, Esq.
On behalf of Employer/Carrier

BEFORE: Thomas F. Phalen, Jr.
Administrative Law Judge

¹The Department of Labor has directed the Office of Administrative Law Judges, the Benefits Review Board, and the Employee Compensation Appeals Board to cease use of the name of the claimant and claimant family members in any document appearing on a Department of Labor web site starting prospectively on August 1, 2006, and to insert initials of such claimant/parties in the place of those proper names. This order only applies to cases arising under the Black Lung Benefits Act, the Longshore and Harbor Workers' Compensation Act, and FECA. In support of this policy change, DOL has directed submission of a proposed rule change to 20 C.F.R. § 725.477, proposing the omission of the requirement that decisions and orders of Administrative Law Judges contain the claimant/parties' initials only, to avoid unwanted publicity of those claimants on the web, and has installed software that prevents entry of the full names of claimant parties on final decisions and related orders. I strongly object to that policy change for reasons stated by several United States Courts of Appeal prohibiting such anonymous designations in discrimination legal actions, such as *Doe v. Frank*, 951 F. 2d 320 (11th Cir. 1992) and

DECISION AND ORDER – DENIAL OF BENEFITS

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, (“the Act”) and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.²

On February 25, 2005, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers’ Compensation Programs, for a hearing. (DX 30).³ A formal hearing on this matter was conducted on February 23, 2006, in Pikeville, Kentucky, by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and to examine and cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES⁴

The issues in this case are:

1. Whether the Claimant has pneumoconiosis as defined by the Act and the regulations;
3. Whether the Claimant’s pneumoconiosis arose out of coal mine employment;
4. Whether Claimant is totally disabled;
5. Whether Claimant’s disability was due to pneumoconiosis; and

those collected at 27 Fed. Proc., L. Ed. § 62:102 (Thomson/West July 2005). Furthermore, I strongly object to the specific direction by the DOL that Administrative Law Judges have a “mind-set” to use the complainant/ parties’ initials if the document will appear on the DOL’s website, for the reason, *inter alia*, that this is not a mere procedural change, but is a “substantive” procedural change, reflecting decades of judicial policy development regarding the designation of those determined to be proper parties in legal proceedings. Such determinations are nowhere better acknowledged than in the judge’s decision and order stating the names of those parties, whether the final order appears on any web site or not. Most importantly, I find that directing Administrative Law Judges to develop such an initial “mind-set” constitutes an unwarranted interference in the judicial discretion proclaimed in 20 C.F. R. § 725.455(b), not merely that presently contained in 20 C.F.R. § 725.477 to state such party names.

² The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ In this Decision, “DX” refers to the Director’s Exhibits, “EX” refers to the Employer’s Exhibits, “CX” refers to the Claimant’s Exhibits, and “Tr.” refers to the official transcript of this proceeding.

⁴ At the hearing, Employer withdrew as uncontested the following issues: whether the miner worked as a miner after December 31, 1969; whether the named employer is the responsible operator; and whether the named employer has secured the payment of benefits. Additionally, the parties stipulated to at least 23 years of coal mine employment. While these withdrawals and stipulations did not take place on the record, they were noted and initialed by the parties on a copy of DX 28, which I have marked as ALJ 2 for purpose of identification.

6. Whether the evidence establishes a material change in conditions per §725.309 (c), (d).

(DX 28).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

B.S. ("Claimant") was born on May 29, 1945 and he was 60 years-old at the time of the hearing. (DX 3). He completed the eighth grade. (DX 3, 18). Claimant married his wife in 1965 and they remain married and living together. (DX 3, 7, 18). He does not have any dependent children. (DX 3, 18). Employer conceded, and I so find, that Claimant has one dependent for purpose of augmentation. (DX 25).

On his application for benefits, Claimant alleged that he engaged in underground coal mine employment for 25 years. (DX 3). Claimant last worked as a general laborer, which included cleaning the tippie and the plant. (DX 1). This position required that he stand for eight hours per day. (DX 1). Claimant last worked in and around coal mines in 1991, when he quit due to his health condition. (DX 2). He received Kentucky State Black Benefits in 1993 and 1994. (DX 2, 18).

Procedural History

Claimant filed his initial claim for benefits under the Act on October 1, 1992. (DX 1). This claim was denied by the District Director, Officer of Workers' Compensation on March 31, 1993, and again on June 28, 1993. The matter was transferred to the Office of Administrative Law Judges, and on August 12, 1994, Administrative Law Judge Edward Murty, Jr. issued a decision and order – rejection of claim, finding that Claimant had failed to satisfy any of the elements of entitlement. Claimant appealed this denial, and on April 27, 1995, the Benefits Review Board affirmed Judge Murty's decision and order.

On August 27, 2001, Claimant filed the instant claim for benefits under the Act. (DX 3).⁵ The Director issued a proposed decision and order – denial of benefits on June 19, 2003. (DX 21). On June 24, 2003, Claimant timely requested a formal hearing before the Office of Administrative Law Judges. (DX 22). The matter was transferred to this office on September 19, 2003. (DX 26). However, on June 21, 2004, this matter was remanded to the Director by order of Administrative Law Judge Hillyard for further development of the medical evidence. (DX

⁵ The record also includes a statement that Claimant desired to withdraw his previous claim, but there is no evidence that a proper adjudicatory officer ever issued a determination on this matter. (DX 3). Therefore, I find that Claimant's 1992 claim was not withdrawn.

27). Finally, on February 24, 2005, this matter was again transferred to the Office of Administrative Law Judges for a formal hearing. (DX 28).

Length of Coal Mine Employment

On his application for benefits, Claimant stated that he engaged in coal mine employment for 25 years. (DX 3). However, the Director determined that Claimant has at least 23 years of coal mine employment. (DX 21). The parties have stipulated that the Claimant worked at least 23 years in or around one or more coal mines. (ALJ 2). I find that the record supports this stipulation, (DX 4-6, 18), and therefore, I hold that the Claimant worked at least 23 years in or around one or more coal mines.

Claimant's last employment was in the Commonwealth of Kentucky (DX 4, 14); therefore, the law of the Sixth Circuit is controlling.⁶

Responsible Operator

Liability under the Act is assessed against the most recent operator which meets the requirements of §§ 725.494 and 725.495. The District Director identified Trojan Mining as the putative responsible operator due to the fact that it was the last company to employ Claimant for a full year. (DX 14). Employer does not contest its designation as responsible operator. (ALJ 2). Therefore, I find that Trojan Mining is properly designated as the responsible operator in this case.

NEWLY SUBMITTED MEDICAL EVIDENCE

Section 718.101(b) requires any clinical test or examination to be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. *See* §§ 718.102 - 718.107. The claimant and responsible operator are entitled to submit, in support of their affirmative cases, no more than two chest x-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two blood gas studies, no more than one report of each biopsy, and no more than two medical reports. §§ 725.414(a)(2)(i) and (3)(i). Any chest x-ray interpretations, pulmonary function studies, blood gas studies, biopsy report, and physician's opinions that appear in a medical report must each be admissible under § 725.414(a)(2)(i) and (3)(i) or § 725.414(a)(4). §§ 725.414(a)(2)(i) and (3)(i). Each party shall also be entitled to submit, in rebuttal of the case presented by the opposing party, no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, or biopsy submitted, as appropriate, under paragraphs (a)(2)(i), (a)(3)(i), or (a)(3)(iii). §§ 725.414(a)(2)(ii), (a)(3)(ii), and (a)(3)(iii). Notwithstanding the limitations of §§ 725.414(a)(2) or (a)(3), any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence. § 725.414(a)(4). The results of the complete pulmonary examination shall not be counted as evidence submitted by the miner under § 725.414. § 725.406(b).

⁶ Appellate jurisdiction with a federal circuit court of appeals lies in the circuit where the miner last engaged in coal mine employment, regardless of the location of the responsible operator. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989)(en banc).

Claimant selected Dr. Imtiaz Hussain to provide his Department of Labor sponsored complete pulmonary examination. (DX 8). Dr. Hussain conducted the examination on March 20, 2002. I admit Dr. Hussain's report under § 725.406(b). I also admit Dr. Sargent's quality-only interpretation of the chest x-ray under § 725.406(c).

Claimant did not complete a Black Lung Benefits Act Evidence Summary Form. The record, however, reveals that Claimant's only newly submitted evidence includes interpretations of the April 18, 1990 and September 12, 2001 x-rays, November 10, 1998 and September 12, 2001 PFTs, a July 12, 2002 ABG, Dr. Gibson's January 28, 2002 medical report, and Dr. Sikder's September 12, 2001 medical report supplemented by his July 12, 2002 report. I find that this evidence complies with the limitations of § 725.414(a)(3). Therefore, I admit Claimant's evidence.

Employer did not complete a Black Lung Benefits Act Evidence Summary Form. The record includes Dr. Fino's complete pulmonary evaluation, Dr. Kendall's interpretation of the May 2, 2002 x-ray, Dr. Dahhan's PFT and ABG studies, and Dr. Dahhan's medical report. Employer's evidence complies with the requisite quality standards of §§ 718.102-107 and the limitations of § 725.414(a)(3). Therefore, I admit Employer's evidence.

At the hearing, the record was held open for the submission of additional medical evidence. (Tr. 12-13). Claimant, however, did not submit his medical report, and he did not notify this office requesting an extension. On May 2, 2006, Employer submitted a rebuttal report and deposition from Dr. Jarboe. This report, however, will not be considered in the instant adjudication due to the fact that employer has not submitted an evidence summary form, and inclusion of Dr. Jarboe's report would exceed the limitations of §725.414. Also, Employer's authorization to submit rebuttal evidence was contingent on Claimant's submission of an additional report. (Tr. 14). Since Claimant chose not to add to the record, I find that Employer is not entitled to additional supporting opinions.

X-RAYS

Exhibit	Date of X-ray	Date of Reading	Physician / Credentials	Interpretation
DX 13	4/18/90	----	Illegible	1/0 pq
DX 13	9/12/01	9/12/01	Sikder	1/2 pq
DX 9	3/20/02	3/20/20	Hussain	Negative
DX 9	3/20/02	5/20/02	Sargent, BCR ⁷ , B-reader ⁸	Quality only
DX 10	3/22/02	4/09/02	Fino, B-reader	Negative
DX 11	5/02/02	5/02/02	Kendall, BCR, B-reader	Negative

⁷ A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. See 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

⁸ A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.51) Consequently, greater weight is given to a diagnosis by a "B" Reader. See *Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

PULMONARY FUNCTION TESTS

Exhibit/ Date	Co-op./ Undst./ Tracings	Age/ Height⁹	FEV₁	FVC	MVV	FEV₁/ FVC	Qualifying Results
DX 13 11/10/98	Fair/ Good/ No	53 66.5"	3.59	4.12	---	87	No
DX 13 09/12/01	Good/ Good/ Yes	55 68"	1.91 2.13*	2.15 2.41*	---	88 88*	Yes No*
DX 9 03/20/02	Good/ Good/ Yes	56 69"	3.44 2.99*	3.96 3.68*	91	86.9 81.3*	No No *
DX 10 03/22/02	Not listed/ Not listed/ Yes	56 68"	2.85	3.26	----	87	No
DX 12 07/13/02	Poor/ Good/ Yes	57 66.1"	3.06 2.48	3.29 2.7*	60 63*	93 92*	No Invalid*

* indicates post-bronchodilator values

ARTERIAL BLOOD GAS STUDIES

Exhibit	Date	pCO₂	pO₂	Qualifying
DX 9	3/20/02	28.8 32.9*	92.0 96.0*	No No*
DX 10	3/22/02	40.4	91.3	No
DX 13	7/12/02	36	86	No
DX 12	7/13/02	32.9 32.9*	87.9 85.3*	No No*

* indicates post-exercise values

Narrative Reports

Dr. Imtiaz Hussain examined Claimant on March 20, 2002 and submitted a report. (DX 9). Dr. Hussain considered the following: symptomatology (sputum, wheezing, dyspnea, and cough), employment history (21 years coal mine employment), individual history (stroke in 1994, arthritis, and high blood pressure), family history (high blood pressure, heart disease, diabetes, and emphysema), smoking history (never smoked), physical examination (no significant findings), chest x-ray (negative), PFT (normal), ABG (normal), and an EKG

⁹ The factfinder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). I find Claimant's height to be 67.5 inches.

(normal). Based on these results, Dr. Hussain opined that Claimant does not have any pulmonary illness or impairment.

Dr. Gregory Fino, an internist, pulmonologist, and B-reader, examined Claimant on March 22, 2002 and submitted a report dated April 9, 2002. (DX 10). Dr. Fino considered the following: symptomatology (shortness of breath, dyspnea on minimal exertion, chest pain, daily cough, mucous production, and wheeze), employment history (21 years underground coal mine employment, last working as a general laborer, which involved heavy lifting), individual history (emphysema, and stroke), family history (heart disease and diabetes), smoking history (never smoked), physical examination (no significant findings), chest x-ray (0/0), PFT (normal), and an ABG (normal). Dr. Fino also considered evidence from Claimant's previous claim.¹⁰ Based on these results, Dr. Fino opined that Claimant does not suffer from clinical or legal pneumoconiosis. In support he cited his own B-reading; a PFT that showed no obstructive or restrictive ventilatory impairment; and an ABG that revealed no impairment in oxygen transfer. From a functional perspective, Dr. Fino opined that Claimant's system was normal and that he retains the physiological capacity to perform all of the requirements of his last job. Finally, Dr. Fino stated that even if Claimant were assumed to have clinical or legal pneumoconiosis, his functional finding would remain unchanged.

Dr. A. Dahhan, an internist, pulmonologist, and B-reader, examined Claimant on July 13, 2002 and submitted a report dated July 18, 2002. (DX 12). Dr. Dahhan considered the following: symptomatology (cough, sputum, wheeze, and dyspnea on exertion), employment history (21 years of underground coal mine employment, operating a bolt machine, and ending in 1991), individual history (kidney stone), smoking history (never smoked), physical examination (no significant findings), PFT (normal with less than optimal effort), ABG (normal), and an EKG (regular sinus rhythm with a pattern of left anterior hemi block). Dr. Dahhan also reviewed Dr. Fino's April 2002 report and previous x-ray interpretations by Drs. Wheeler, Scott, and Kendall.¹¹ Based on this evidence, Dr. Dahhan found that there were insufficient objective findings to justify a diagnosis of pneumoconiosis. Dr. Dahhan also found no objective findings to indicate any pulmonary impairment, and concluded that Claimant retains the physiological capacity to continue his previous coal mining work or a job of comparable physical demand. Finally, Dr. Dahhan stated that even if Claimant were to have x-ray evidence of CWP, he would continue to conclude that Claimant retains the functional capacity to perform his previous coal mining job.

Dr. Ayesha Sikder submitted a consultation report on September 12, 2001, and the findings were repeated in his July 12, 2002 supplement. (DX 13). Dr. Sikder considered the following: symptomatology (cough, sputum, wheezing, chest tightness, dyspnea, and severe

¹⁰ The list of considered evidence includes a number of reports that were not part of Claimant's 1992 claim and are not included under the instant application for benefits. As a result, since inclusion of these reports would exceed the limitations, Dr. Fino's opinions that rely on these inadmissible reports may not be considered in the instant adjudication. However, upon review of reliance on Dr. Fino's opinion, I find that his ultimate conclusions were predominantly based on his own 2002 findings, and those that were not are easily severable.

¹¹ Drs. Wheeler and Scott interpretations of the May 2, 2002 and December 8, 1999 x-rays are not admissible within the limitations of §725.414. Therefore, any of Dr. Dahhan's conclusions that rely on these readings will not be considered in the instant adjudication. However, I find that Dr. Dahhan's ultimate conclusions are predominantly based on his own 2002 findings, and those that were not are easily severable.

exercise intolerance), employment history (25 years coal mine employment, mostly underground, retiring in 1991), individual history (kidney stones), family history (diabetes and heart disease), smoking history (never smoked), physical examination (prolonged expiratory phase), chest x-ray (reduced lung volumes), PFT (moderate airway obstructive disease with no bronchodilator response), and an ABG. Also, attached to his report were values from a November 10, 1998 study (charted above). Dr. Sikder diagnosed CWP/silicosis based on the chest x-ray. He also opined that the restrictive lung disease was due to coal dust exposure, and that he has a moderate pulmonary impairment (50%) based on the PFT. Noting that Claimant has no history of tobacco use, Dr. Sikder concluded that Claimant's COPD and CWP were caused entirely by his occupational exposure. Finally, based on the PFT results, Dr. Sikder concluded that Claimant does not retain the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free-environment.

Dr. K.D. Gibson examined Claimant on December 28, 2001 and submitted a report on January 28, 2002. (DX 13). Dr. Gibson considered the following: symptomatology (sputum, wheezing, dyspnea, cough, and shortness of breath on exertion), employment history (approximately 24 years coal mine employment, ending in 1991), individual history (frequent colds, wheezing, chronic bronchitis, and high blood pressure), family history (high blood pressure, heart disease, diabetes, and stroke), smoking history (never smoked), physical examination (decreased breath sounds), chest x-ray (conducted by Dr. Sikder on 9/12/01), and a PFT (conducted by Dr. Sikder on 9/12/01). Dr. Gibson diagnosed CWP caused by coal dust exposure, and based this on his physical examination, history, and lab findings. He opined that Claimant's resulting impairment was moderate, and that Claimant does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust free-environment due to his increased shortness of breath with minimal exercise. He also concluded that Claimant was 100% disabled from his prior work due to his chronic back pain.

Smoking History

At the 2002 deposition, Claimant testified that he has never smoked. (DX 18). As this testimony is undisputed, I find that Claimant is a life-long non-smoker.

DISCUSSION AND APPLICABLE LAW

This claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, that he:

1. Is a miner as defined in this section; and
2. Has met the requirements for entitlement to benefits by establishing that he:
 - (i) Has pneumoconiosis (see § 718.202), and
 - (ii) The pneumoconiosis arose out of coal mine employment (see § 718.203), and

(iii) Is totally disabled (see § 718.204(c)), and

(iv) The pneumoconiosis contributes to the total disability (see § 718.204(c)); and

3. Has filed a claim for benefits in accordance with the provisions of this part.

Section 725.202(d)(1-3); *see also* §§ 718.202, 718.203, and 718.204(c).

Subsequent Claim

The provisions of § 725.309 apply to new claims that are filed more than one year after a prior denial. Section 725.309 is intended to provide claimants relief from the ordinary principles of *res judicata*, based on the premise that pneumoconiosis is a progressive and irreversible disease. *See Lukman v. Director, OWCP*, 896 F.2d 1248 (10th Cir. 1990); *Orange v. Island Creek Coal Company*, 786 F.2d 724, 727 (6th Cir. 1986); § 718.201(c) (Dec. 20, 2000). The amended version of § 725.309 dispensed with the material change in conditions language and implemented a new threshold standard for the claimant to meet before the record may be reviewed *de novo*. Section 725.309(d) provides that:

If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part, the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see § 725.202(d) miner. . .) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:

(1) Any evidence submitted in conjunction with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

(2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of the subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

(3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence establishes at least one applicable condition of entitlement. . . .

(4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue, shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

Section 725.309(d) (April 1, 2002).

The Benefits Review Board defined "material change in conditions" under § 725.309(d) as occurring when a claimant establishes, by a preponderance of the evidence developed subsequent to the prior denial, at least one of the elements of entitlement previously adjudicated against the claimant. *See Allen v. Mead Corp.*, 22 B.L.R. 1-61 (2000). The Board has also held that a material change in conditions may only be based upon an element which was previously denied. *Caudill v. Arch of Kentucky, Inc.*, 22 B.L.R. 1-97 (2000) (en banc on recon.) (where Administrative Law Judge found that claimant did not establish pneumoconiosis and did not specifically address total disability, the issue of total disability may not be considered in determining whether the newly submitted evidence is sufficient to establish a material change in conditions).

Claimant's prior claim was denied after Judge Murty determined that he failed to satisfy any of the elements of entitlement. (DX 1). This determination was affirmed by the Board. Consequently, Claimant must establish, by a preponderance of the newly submitted evidence, that he has pneumoconiosis arising out of coal mine employment, or that he is totally disabled due to pneumoconiosis. If Claimant is able prove any of these elements by a preponderance of the evidence, then he will avoid having his subsequent claim denied on the basis of the prior denial.

Pneumoconiosis

Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Pneumoconiosis is defined by the regulations:

(a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.

(1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition

includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For the purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

Sections 718.201(a-c).

Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis.

(1) Under § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). I may also assign heightened weight to the interpretations by physicians with superior radiological qualifications. See *McMath v. Director, OWCP*, 12 B.L.R. 1-6 (1988); *Clark*, 12 B.L.R. 1-149 (1989).

The newly submitted evidence includes five interpretations of five chest x-rays and one quality-only interpretation. At the hearing, Employer objected to the inclusion of the interpretations of the April 18, 1990 and September 12, 2001 films on the grounds that the films had not been provided for rebuttal reading. (Tr. 8.) I instructed Claimant to either provide Employer with the films or sign a release. (Tr. 8-9). In addition, the parties were given until June 15, 2006 to submit post-hearing briefs. (Tr. 14). Since Employer failed to submit a brief¹² and did not file a renewed objection to these x-rays, I presume that Claimant complied with my instructions and Employer simply chose not to submit rebuttal readings. Therefore, I will give full-weight to the April 18, 1990 and September 12, 2001 x-ray interpretations.

Claimant submitted a positive interpretation of the April 18, 1990 x-ray. I note, however, that both the signature and the reading date were cut off of the filed copy. Since there were no contradictory interpretations of this film, I find that it is positive for pneumoconiosis, but I give

¹² On July 12, 2006, Employer submitted a motion to file a late brief. Since this motion was received out of time, it is denied.

this interpretation less weight based on the fact that I am not able to determine which physician provided the reading, and the fact that the film is eleven years older than the next most recent newly submitted x-ray.

Dr. Sikder interpreted the September 12, 2001 x-ray as positive for pneumoconiosis. There were no negative readings. Therefore, I find that the September 2001 film is positive.

Dr. Hussain read the March 20, 2002 x-ray as negative for pneumoconiosis. There were no positive interpretations. Therefore, I find that the March 20, 2002 film is negative.

Dr. Fino, a B-reader, read the March 22, 2002 x-ray as negative for pneumoconiosis. There were no positive interpretations. Therefore, I find that the March 22, 2002 film is negative.

Dr. Kendall, a radiologist and B-reader, read the May 2, 2002 x-ray as negative for pneumoconiosis. There were no positive interpretations. Therefore, I find that the May 2, 2002 is negative.

I have found that the 1990 and 2001 x-rays are positive for pneumoconiosis, but that the three 2002 films are negative for the disease. In addition, both of the B-readings, including Dr. Kendall's dually certified interpretation, are negative. Therefore, based on quality and recentness, I find that the preponderance of the x-ray evidence is negative for pneumoconiosis.

(2) Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. The evidentiary record does not contain any biopsy evidence. Therefore, I find that the Claimant has not established the existence of pneumoconiosis through biopsy evidence under subsection (a)(2).

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis. Section 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982. Therefore, Claimant cannot establish pneumoconiosis under subsection (a)(3).

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 set forth in subsection (a)(4) which provides in pertinent part:

A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

§ 718.202(a)(4).

This section requires a weighing of all relevant medical evidence to ascertain whether or not the claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985). A brief and conclusory medical report which lacks supporting evidence may be discredited. *See Lucostic v. United States Steel Corp.*, 8 B.L.R. 1-46 (1985); *see also, Mosely v. Peabody Coal Co.*, 769 F.2d 257 (6th Cir. 1985). Further, a medical report may be rejected as unreasonable where the physician fails to explain how his findings support his diagnosis. *See Oggero*, 7 B.L.R. 1-860.

Dr. Gibson considered a positive x-ray, a qualifying PFT, a physical examination, and 24 years coal mine employment. He concluded that Claimant suffered from CWP. Based on the same PFT and x-ray, a non-qualifying ABG study, and his own physical examination, Dr. Sikder diagnosed CWP/silicosis and COPD caused by coal mine employment. Both of these opinions were adequately based on the objective evidence considered, and are thus, well-reasoned and documented. Therefore, I find that Drs. Gibson and Sikder's opinions are entitled to probative weight.

Drs. Hussain, Dahhan, and Fino all opined that Claimant did not suffer from pneumoconiosis. I find that all three of these opinions are adequately supported by the objective evidence of record, and thus, well-reasoned and well documented. Furthermore, even though Dr. Dahhan invalidated his PFT, he considered Dr. Fino's valid study in reaching his conclusions. Therefore, I find that Dr. Hussain's opinion is entitled to probative weight, and bolstered by their credentials as internists and pulmonologists, I accord Drs. Fino and Dahhan's opinions substantial probative weight.

I have found all five of the newly submitted medical opinions of record to be well-reasoned and documented. However, I find that the opinions by Drs. Hussain, Fino, and Dahhan are entitled to more weight than those by Drs. Gibson and Sikder. First, Drs. Hussain, Fino, and Dahhan have the advantage of more recent PFT and x-ray evidence, and thus are more probative. *See Gillespie v. Badger Coal Co.*, 7 B.L.R. 1-839 (1985)(holding that a medical report containing the most recent physical examination of the miner may be properly accorded greater weight as it is likely to contain a more accurate evaluation of the miner's current condition). Second, Drs. Fino and Hussain's x-ray interpretations are consistent with my determination as to preponderance of the newly submitted x-ray evidence. Finally, due to Drs. Dahhan and Fino's advanced credentials, I find that their opinions are entitled to additional weight. On the other hand, while Drs. Gibson and Sikder are purportedly Claimant's treating physicians, there is no evidence in the newly submitted record detailing their extent or frequency of their treatment. As a result, I do not find their opinions to be entitled to added weight. Therefore, considering all of the newly submitted medical reports, I find that the preponderance of the evidence does not support a finding of pneumoconiosis under subsection (a)(4).

I have determined that Claimant has not proven that he suffers from pneumoconiosis under §718.202(a)(1)-(4). Therefore, considering all of the newly submitted evidence, I find that Claimant has failed to prove the existence of pneumoconiosis by a preponderance of the evidence. However, Claimant may still prevent his subsequent claim from being denied on the basis of the prior denial by establishing the existence of a totally disabling respiratory or pulmonary impairment.

Total Disability

To be entitled to benefits under the Act, Claimant must demonstrate that he is totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of § 718.204(b) or the irrebuttable presumption referred to in § 718.204(b). The Board has held that under § 718.204(b), all relevant probative evidence, both like and unlike must be weighed together, regardless of the category or type, in the determination of whether the Claimant is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

The record does not include any evidence that Claimant suffers from complicated pneumoconiosis. Therefore, the irrebuttable presumption of § 718.304 does not apply.

Total disability can be shown under § 718.204(b)(2)(i) if the results of pulmonary function studies are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718. More weight may be accorded to the results of a recent ventilatory study over the results of an earlier study. *Coleman v. Ramey Coal Co.*, 18 B.L.R. 1-9 (1993). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). Little or no weight may be accorded to a ventilatory study where the miner exhibited “poor” cooperation or comprehension. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984)

The newly submitted PFT evidence consists of five studies, three of which include both pre and post-bronchodilator values. I accord less weight to the November 10, 1998 study due to the fact that there were no tracings. Likewise, I accord the July 13, 2002 study little weight due to the fact that Claimant demonstrated “poor” cooperation and also based on Dr. Dahhan’s express invalidation of the post-bronchodilator study. Considering the remaining three studies, with exception of the September 12, 2001 pre-bronchodilator study, all of the PFT were non-qualifying. I also note that the two most recent studies were non-qualifying. Therefore, I find that the preponderance of the PFT evidence is non-qualifying, and that Claimant has not proven total disability under subsection (b)(2)(i).

Total disability can be demonstrated under § 718.204(b)(2)(ii) if the results of arterial blood gas studies meet the requirements listed in the tables found at Appendix C to Part 718. None of the newly submitted ABG studies produced values that meet the requirements of the tables found at Appendix C to Part 718. Therefore, I find that Claimant has not established total disability under subsection (b)(2)(ii).

Total disability may also be shown under § 718.204(b)(2)(iii) if the medical evidence indicates that Claimant suffers from cor pulmonale with right-sided congestive heart failure. The record does not contain any evidence indicating that Claimant suffers from cor pulmonale with right-sided congestive heart failure. Therefore, I find that Claimant has not established total disability under subsection (b)(2)(iii).

Section 718.204(b)(2)(iv) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine employment or comparable gainful employment. Claimant's last coal mine employment as a general laborer required that he stand for eight hours per day. (DX 1).

The exertional requirements of the claimant's usual coal mine employment must be compared with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(b)(1). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988). Non-respiratory and non-pulmonary impairments have no bearing on establishing total disability due to pneumoconiosis. § 718.204(a); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986).

Drs. Sikder and Gibson concluded that Claimant was totally disabled. Since the PFT they considered qualified under the regulatory requirement for disability in coal miners, I find that their opinions were well-reasoned and well-documented, and thus, accord them probative weight. Drs. Dahhan, Fino, and Hussain, however, all considered more recent, non-qualifying PFT evidence in reaching their conclusions that Claimant was not totally disabled. Furthermore, I find that Drs. Dahhan, Fino, and Hussain's opinions are well-reasoned and well-documented based on all of the admissible, objective evidence they considered, including the physical findings, ABG studies, and PFT values. Also, I note Drs. Fino and Dahhan's advanced credentials. Therefore, even though I find that all of the newly submitted total disability opinions are well-reasoned and well-documented, I find that those concluding no disability, particularly Dr. Fino's and Dr. Dahhan's, to be the most probative. Therefore, I find that Claimant has not established total pulmonary disability by a preponderance of the newly submitted evidence under subsection (b)(2)(iv).

I have determined that Claimant has not proven that he is totally disabled from a respiratory standpoint under subsections (b)(2)(i)-(iv). Therefore, upon consideration of all the newly submitted evidence, I find that Claimant has not demonstrated a change in condition.

Entitlement

Since the newly submitted evidence does not prove that he suffers from pneumoconiosis, or that he is totally disabled due pneumoconiosis, Claimant has failed to establish a change in conditions sufficient to meet the statutory requirements of § 725.309(d). Therefore, Claimant is not entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

ORDER

IT IS ORDERED that the claim of B.S. for benefits under the Act is hereby DENIED.

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THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).

